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NO:

IN THE
SUPREME COURT OF THE UNITED STATES

JILDARDO MENDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the attempt to obtain a Florida commercial driver's license, without more, can be found to have "affected interstate commerce" thus constituting a federal crime.

INTERESTED PARTIES

There are no interested parties other than those listed in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI

Jildardo Mendez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in United States v. Jildardo Mendez, 528 F.3d 811 (11th Cir. 2008).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in the Appendix (App. 1). Also included in the appendix is the district court's order finding Mr. Mendez guilty of both counts. (App. 19).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. This petition is timely filed pursuant to SUP. CT. R. 13.1 and 13.3.

STATUTORY PROVISION INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

18 U.S.C. § 1028(a)(1) and (c)(3)(A)

Whoever ... knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document; ... [which] production is in or affects interstate or foreign commerce [is guilty of this offense].

STATEMENT OF THE CASE

A. INTRODUCTION

It is among the most basic principles of federal criminal law: Before an individual may be convicted of a federal crime, the Government must prove some nexus to the federal government. Some statutes, like 18 U.S.C. § 371, have an intent element involving the United States: "conspiracy to defraud the United States." Others, like 18 U.S.C. § 1028(a)(1), require that the crime have "an effect on interstate commerce."

Mr. Mendez was charged with violating both of these statutes. Although the parties agreed that Mendez fraudulently acquired a Florida commercial driver's license ("CDL") from a Florida driver's license bureau, they disagreed as to whether doing so was a federal crime. At a bench trial, Mendez argued that he only intended to defraud the State of Florida, not the United States, and that his actions did not have an effect on interstate commerce. The trial court found that because the U.S. government had minimum requirements regarding states issuing CDLs, Mr. Mendez did have the requisite intent to defraud the United States, even though he had no idea that the federal government had anything to do with CDLs. And the trial judge found that Mendez's actions affected interstate commerce because he drove home from the driver's license bureau on publicly funded roads in a car that must have been manufactured outside of Florida.

The Eleventh Circuit rejected this reasoning and reversed Count I. But even though the court also rejected the district court's reasoning on Count II, it affirmed the finding that Mendez must have intended at some future time to use his commercial driver's license in a way that affected interstate commerce.

The lower court's logic would turn literally every crime into a federal offense. The crime in this case – the attempted production of a commercial driver's license – had no effect on interstate commerce. Mendez's conviction therefore must be reversed.

B. THE CHARGES AGAINST MR. MENDEZ

The Government initially charged Mendez with a violation of 18 U.S.C. § 1028(a)(4) – knowingly possessing an identification document, other than one issued lawfully for the use of the possessor, that is, a Florida commercial driver's license, for the purpose of defrauding the United States. DE 11. The defense filed a motion for a bill of particulars, seeking "information as to how Mr. Mendez intended to defraud the United States." DE 15:2.

In response, the Government superceded the indictment with a different section under 1028 that did not require intent to defraud the United States. DE 24. The Government, in the superceding indictment, charged that the defendant knowingly and without lawful authority caused an identification document to be produced, to wit, a Florida commercial driver's license, in and affecting interstate commerce, in violation of 18 U.S.C. § 1028(a)(1) & (c)(3)(A), and 2.

The jurisdictional hook in this section, as opposed to 1028(a)(4) which required intent to defraud the United States, was that the production of the identification affected interstate commerce. The Government also added an additional charge of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. DE 24.

Based on this additional charge, Mendez filed another motion for bill of particulars, again requesting information regarding how Mendez conspired to defraud the United States (as opposed to the State of Florida). DE 25. The Government responded that because Mendez "circumvent[ed] the federally mandated minimum standards . . . for issuance of a CDL," DE 30:3, he must have intended to defraud the United States and therefore the motion should be denied. The court denied the motion, stating that the Government had "provide[d] more than enough information to allow the Defendant to prepare an effective trial strategy. . . . It appears that what the Defendant seeks is a dismissal of the charges, that effort is premature." DE 32.

Shortly before trial, the Government superceded a second time, again amending the 1028 count. DE 37. The final incantation of the indictment was as follows:

Count I: "Jildardo Mendez did knowingly and willfully combine, conspire, confederate, and agree with others to defraud the United States," in violation of 18 U.S.C. § 371.

Count II: "Jildardo Mendez knowingly, willfully,

> and without lawful authority caused, and attempted to cause, an identification document to be produced, to wit, a Florida commercial driver's license, in and affecting interstate commerce, in violation of 18 U.S.C. § 1028(a)(1), (c)(3)(A), and (f), and 18 U.S.C. § 2."

DE 37.

C. THE STIPULATED FACTS

The parties agreed to waive a jury trial, and proceeded to try the case to the court. DE 41. The parties also agreed to a set of stipulated facts and entered into a stipulation, which was signed by the Government, Mr. Mendez, and undersigned counsel. DE 42. The Eleventh Circuit summarized those facts as follows:

> Mendez and the government stipulated to the following facts. On February 14, 2007, an anonymous caller provided information to officers of the Florida Highway Patrol regarding fraudulently obtained CDLs. The caller explained that Steven Baez, a member of the Florida Army National Guard, was selling DA-348E forms for approximately $1,200 to $2,000. The DA-348E form is a Department of Army "Operator Qualification Record" that sets forth the fitness, training and equipment qualifications of its personnel who have qualified to operate commercial motor vehicles. The form is one way by which an individual may demonstrate his compliance with the Florida

CDL requirements and thereby waive the completion of the requisite Florida CDL testing. The caller further explained that Baez had been providing these forms to non-military personnel and escorting them to the Homestead, Florida Department of Motor Vehicles ("DMV") to obtain CDLs.

A law enforcement investigation concerning Baez revealed that approximately 186 DA-348E forms had been fraudulently submitted at the Homestead DMV licensing branch. The investigation also determined that Mendez obtained a Class A CDL on September 14, 2006 using a fraudulent DA-348E form of the same type as those that Baez sold. Officers arrested Mendez on April 9, 2007, and Mendez waived his Miranda rights in writing.

During a post-arrest interview, Mendez stated that he had spoken via telephone to a man named Steven about obtaining a CDL because he thought his problems reading and writing English would prevent him from otherwise obtaining a CDL. Pursuant to Baez's instructions, Mendez met Baez outside the Homestead DMV on September 14 with $1,000 cash. In exchange for the money, Baez gave Mendez a form that Baez had filled out with Mendez's personal information, which Mendez had communicated to Baez during their phone conversation. Mendez then used the form to obtain a Florida CDL, which costs $50 and requires forfeiture of all other driver licenses.

Although Mendez recognized that Baez was wearing a United States military uniform when they met, Mendez did not know the purpose of the DA-348E form or that it was a Department of Army form. Mendez did know, however, that an acquaintance had illegally obtained a CDL using a military form purchased from Baez.

The stipulation further provided that in traveling to the Homestead DMV, Mendez drove a motor vehicle, not a Class A vehicle, on public highways and roads. Mendez never bought or drove any Class A vehicle. Finally, the stipulation declared that using a driver's license involves operating a motor vehicle, which requires the purchase and consumption of gasoline that travels in interstate and foreign commerce.

D. THE BENCH TRIAL

Other than the stipulation, no other facts were admitted in evidence. Accordingly, both sides made legal argument to the court. As for conspiracy to defraud the United States, the Government argued that because the federal government had an interest in state-issued CDLs, Mendez must have intended to defraud the United States. DE 60:32 ("[A]lthough [Mendez's] primary intention may have been to defraud the state, Your Honor, whether the defendant wants to acknowledge it or not, he clearly defrauded the federal government."). On Count II, the United

States argued that because Mendez drove on public roads, his actions affected interstate commerce. DE 60:36 ("[T]he use of a commercial driver's license involves the inherent use of a vehicle on a public road. ... [H]e had to use gas. Gas is produced and travels in interstate and foreign commerce.").

The defense argued that there was insufficient proof on both counts. Regarding the intent to defraud the United States, the defense said that even assuming the Government actually proved that the federal government was defrauded, "what the Government has failed to prove is that Mr. Mendez knowingly and intentionally defrauded the United States." DE 60:37. As for driving on public roads and using gasoline as a basis to prove an effect on interstate commerce, the defense responded that such an argument, if accepted, would federalize every crime. DE 60:21. At the conclusion of the argument, the court recessed and stated that it would issue its ruling the following week.

E. THE VERDICT AND SENTENCING

The court issued a four-page order finding Mendez guilty of both counts. (App. 19). As to defrauding the United States (count I), the court found:

> Mendez intended to use a fraudulent document to obtain a commercial drivers' license that he felt he would not otherwise be able to obtain. He was willing to pay $1,000 to accomplish this goal. Congress has heavily regulated the method of obtaining commercial drivers' licenses. By fraudulently obtaining the license,

> Mendez was intending to defraud the issuing agencies, in this case both the State of Florida, who issued the license, and the U.S. Dept. of Transportation, who promulgated the minimum rules and regulations for obtaining such a license. Consequently, the Court finds, beyond a reasonable doubt, that Mendez intended to defraud both the State of Florida and the federal government (and any one else who might have a say in his obtaining the license).
>
> There was no evidence presented to the court, however, that Mendez knew that the U.S. Dept. of Transportation ("DoT") promulgated the minimum rules and regulations for obtaining such a license, or that the DoT was defrauded, or that Mendez intended to defraud the DoT. The court, however, found that if the DoT promulgated rules for states to issue CDLs, then Mendez must have known that and must have intended to defraud that federal agency. Such a leap was not supported by the evidence or by any logical inference.

And as to whether Mendez's actions affected interstate commerce, the court found:

> The Government need only prove a minimal nexus with interstate commerce in a §1028(a) prosecution. U.S. v. Klopf, 423 F.3d 1228, 1239 (11th Cir. 2005). Mendez drove home from Homestead with the commercial drivers license on September 14, 2006. He drove to Coral Reef on April 9, 2007 with that license. He lives at

> 36609 S.W. 217 Avenue, in Florida City and owns Gilbert's nursery. The Court concludes that he drove vehicles for both business and pleasure during the six months that he possessed the fraudulently obtained commercial drivers license. The car that he drove would have been manufactured outside the state of Florida. The gasoline that he put in the car was refined outside the State of Florida. He drove on roads that were partially supported by federal funds. The court finds, beyond a reasonable doubt, that Mendez's crime had an effect on interstate commerce.

The court sentenced Mr. Mendez to one year probation, 50 community service hours, and a $200 special assessment. (App. 13). Mendez timely appealed. DE 50.

F. THE ELEVENTH CIRCUIT OPINION

On May 21, 2008, the Eleventh Circuit reversed Mendez's conviction on Count I, and affirmed on Count II. It rejected the district court's reasoning on Count II, but found:

> To satisfy the interstate commerce requirement ... the government need only show a minimal nexus. Klopf, 423 F.3d at 1239. The government may prove the requisite minimal nexus by showing either that the defendant's actions actually affected interstate commerce, see 18 U.S.C. § 1028(c)(3)(A), or by showing that the defendant "had the intent to accomplish

acts, which, if successful, would have affected interstate or foreign commerce." Klopf, 423 F.3d at 1239.

The district court found Mendez guilty based on the crime's actual affect on interstate commerce. We need not decide that issue, however, because we hold that the district court could have found beyond a reasonable doubt that Mendez intended to accomplish acts that would have affected interstate commerce if they had been successful. Specifically, the stipulated facts show that Mendez paid $1000 to fraudulently obtain the CDL. That alone is sufficient evidence that Mendez intended to use the CDL in a manner that would have affected interstate commerce. Mendez clearly intended to operate a commercial vehicle, and operating a commercial vehicle illegally, even if the vehicle never leaves Florida, sufficiently affects interstate commerce to satisfy the minimal nexus requirement. Accordingly, under Klopf, we must affirm Mendez's conviction of Count 2.

REASONS FOR GRANTING THE WRIT

This Court should define the outer limits of the federal government's reach under the commerce clause.

The Circuit's Court's reasoning – that the government need not show an actual effect on interstate commerce, just the possibility of an effect – is far more expansive than any prior authority. In fact, such a decision threatens to open federal jurisdiction up to just about every local crime. Such an expansive view of the commerce clause is not appropriate. This case demonstrates exactly why – Mr. Mendez attempted to obtain a Florida commercial driver's license in Florida at a Florida driver's license bureau. He never used the commercial driver's license to buy or drive a commercial vehicle. During the many months he possessed the license, he never did anything that affected interstate commerce.

The district court convicted Mendez on the premise that he drove to and from the Florida motor vehicles department on a federal highway. The appellate court rejected this reasoning, but nonetheless ruled that Mendez must have intended to use the commercial driver's license one day in a way that would affect interstate commerce. But none of the stipulated facts supported such a conclusion. And even if they did, the statute, 18 U.S.C. 1028(a), requires an actual effect be shown, not a hypothetical effect.

This is the ideal case for certiorari:

- The case presents a clear question of law. The issue here – how far the commerce clause reaches in cases where it is a statutory element – is a pure question of law. If lower courts are permitted to find a federal nexus based on mere hypotheticals, federal jurisdiction will be conferred on almost all local crime. Although this Court has addressed the reach of the commerce clause in cases where it was not a stated element (e.g., United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000)), the Court has not done so in a case like this.

- It is important. The question presented in this case is important because the volume of prosecutions under 1028(a) and similar statutes have greatly increased in recent years. These crimes have traditionally been prosecuted by local government, not the federal government. The Court should explain the outer contours of the commerce clause so that federal prosecutors have a better idea of what cases can be prosecuted under federal authority.

- It is ready for resolution. There is no benefit to waiting to hear a similar case. The competing legal positions and consequences are clearly defined and ready for resolution.

- The Eleventh Circuit decision is more expansive than its prior decisions, more expansive than any other Circuit decision to

have considered the issue, and more expansive than this Court's decisions. United States v. Denalli, 73 F.3d 328 (11th Cir. 1996) (holding that there are effects on commerce so trivial or attenuated that they cannot satisfy interstate commerce element); See United States v. Pearce, 65 F.3d 22, 25 (4th Cir. 1995) (fake IDs and manufacturing machines actually traveled in interstate commerce); United States v. Gros, 824 F.2d 1487, 1494-95 (6th Cir. 1995) (approving instruction that permitted a finding that the defendant's actions affected interstate commerce where she induced United States to produce false ID that traveled across state lines); United States v. Jackson, 155 F.3d 942 (8th Cir. 1998) (defendant induced a bank to issue a credit card with a fake driver's license which were used to defraud businesses); United States v. Villarreal, 253 F.3d 831 (5th Cir. 2001) (defendant offered undercover agent a false driver's license to cross Mexican border into the Unites States so that person could stay and work in the United States). United States v. Lopez, 514 U.S. 549, 557 (1995) (warning that "in our dual system of government" and "our complex society" courts should not "obliterate the distinction between what is national and what is local and create a completely centralized government") (internal quotations omitted).

In addition, no case has ever found mere speculation sufficient to satisfy the interstate commerce element. Similar attempts to federalize all crimes have failed. See United

States v. McGuire, 178 F.3d 203, 210, 212 (3d Cir. 1999) (interstate nexus too attenuated to confer jurisdiction over federal arson prosecution stemming from destruction of car, where car used in local catering business contained bottle of orange juice manufactured out-of-state); United States v. Corona, 108 F.3d 565 (5th Cir. 1997) ("[W]e doubt that an effect as small as the cessation of natural gas service to a single household satisfies the constitutional requirement."). The McGuire court explained that the federalization of crime under the commerce clause is "subject to outer limits," stating:

> As we conduct our analysis we are mindful that, "in view of our complex society," there is virtually nothing that does not affect interstate commerce in some manner. Lopez, 514 U.S. at 555. Though certain conduct may appear to be the quintessence of local activity, if we "follow the money" the trail we will always disclose some effect on interstate and/or foreign commerce. For example, though the effect is highly attenuated, driving a few blocks to pick up one's children (consumption of gasoline refined from foreign oil, and wear and tear on vehicle manufactured in another state or country) or eating dinner in front of one's own television set (consuming food and beverages from outside of state or country, as well as decisions on how to

spend hundreds of millions of advertising dollars), have an indirect effect on interstate, and often foreign commerce. Even such a seemingly parochial action as borrowing a cup of sugar from a neighbor can be viewed as part of the stream of commerce that extends to refineries overseas.

- This case is a good vehicle for Supreme Court review. The issue is preserved. The issue is uncluttered and is cleanly presented for this Court's review. The case is outcome determinative – resolving this issue will determine who wins the case. The judgment is final and no further proceedings will shed light on the question. The case has a well-developed record and there are no factual disputes as the parties stipulated to the facts.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Miami, Florida
August 2008

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-13443

D.C. Docket No. 07-20331-CR-WPD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JILDARDO MENDEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(May 21, 2008)

Before WILSON, COX and BOWMAN,* Circuit Judges.

PER CURIAM:

Jildardo Mendez appeals his convictions for conspiracy to defraud the United States, in violation of 18 U.S.C. § 371 (Count 1), and unlawful production

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* Honorable Pasco M. Bowman II, United States Circuit Judge for the Eight Circuit, sitting by designation.

of a Florida commercial driver's license ("CDL"), in violation of 18 U.S.C. § 1028(a)(1), (c)(3)(A), and (f), and 18 U.S.C. § 2 (Count 2). On appeal, Mendez argues that the record does not contain sufficient evidence of either (1) the requisite intent to defraud the United States under § 371, or (2) the requisite interstate commerce nexus under § 1028(a)(1) and (c)(3)(A). For the reasons set forth below, we reverse the conviction of Count 1 and affirm the conviction of Count 2.

I. BACKGROUND

Mendez and the government stipulated to the following facts. On February 14, 2007, an anonymous caller provided information to officers of the Florida Highway Patrol regarding fraudulently obtained CDLs. The caller explained that Steven Baez, a member of the Florida Army National Guard, was selling DA-348E forms for approximately $1,200 to $2,000. The DA-348E form is a Department of Army "Operator Qualification Record" that sets forth the fitness, training and equipment qualifications of its personnel who have qualified to operate commercial motor vehicles. The form is one way by which an individual may demonstrate his compliance with the Florida CDL requirements and thereby waive the completion of the requisite Florida CDL testing. The caller further explained that Baez had been providing these forms to non-military personnel and escorting them to the Homestead, Florida Department of Motor Vehicles ("DMV") to obtain CDLs.

A law enforcement investigation concerning Baez revealed that approximately 186 DA-348E forms had been fraudulently submitted at the Homestead DMV licensing branch. The investigation also determined that Mendez obtained a Class A CDL on September 14, 2006 using a fraudulent DA-348E form of the same type as those that Baez sold. Officers arrested Mendez on April 9, 2007, and Mendez waived his *Miranda* rights in writing.

During a post-arrest interview, Mendez stated that he had spoken via telephone to a man named Steven about obtaining a CDL because he thought his problems reading and writing English would prevent him from otherwise obtaining a CDL. Pursuant to Baez's instructions, Mendez met Baez outside the Homestead DMV on September 14 with $1,000 cash. In exchange for the money, Baez gave Mendez a form that Baez had filled out with Mendez's personal information, which Mendez had communicated to Baez during their phone conversation. Mendez then used the form to obtain a Florida CDL, which costs $50 and requires forfeiture of all other driver licenses.

Although Mendez recognized that Baez was wearing a United States military uniform when they met, Mendez did not know the purpose of the DA-348E form or that it was a Department of Army form. Mendez did know, however, that an acquaintance had illegally obtained a CDL using a military form purchased from Baez.

The stipulation further provided that in traveling to the Homestead DMV, Mendez drove a motor vehicle, not a Class A vehicle, on public highways and roads. Mendez never bought or drove any Class A vehicle. Finally, the stipulation declared that using a driver's license involves operating a motor vehicle, which requires the purchase and consumption of gasoline that travels in interstate and foreign commerce.

A federal grand jury indicted Mendez, and later superceded that indictment charging him with (1) conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and (2) unlawful production, and attempted unlawful production, of a Florida CDL, in violation of 18 U.S.C. § 1028(a)(1), (c)(3)(A), and (f), and 18 U.S.C. § 2. Mendez pled not guilty to both counts, and later waived his right to a jury trial. The district court did not hear any testimony and adopted the stipulated facts as true, but it did hear argument from counsel on the legal issues. It found Mendez guilty of both counts.

II. STANDARD OF REVIEW

We review the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the government and accepting all reasonable inferences in favor of the verdict. *United States v. Klopf,* 423 F.3d 1228, 1236 (11th Cir. 2005). When the government relies on circumstantial evidence, reasonable

inferences, not mere speculation, must support the conviction. *Id.*

III. DISCUSSION

A. Intent to Defraud the United States

Mendez first argues that we must reverse his § 371 conviction because the record does not support the district court's finding that he intended to defraud the U.S. Department of Transportation ("DOT"). He concedes that he defrauded the Florida DMV, but he asserts that there is no evidence that he even knew of any connection between a Florida CDL and the federal government.

Under 18 U.S.C. § 371, it is a crime to "conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner of for any purpose. . . ." The proof required to support a § 371 conviction is different, however, depending on whether the defendant is charged with conspiracy to commit *any offense* against the United States or conspiracy to *defraud* the United States. In *United States v. Harmas,* 974 F.2d 1262 (11th Cir. 1992), we explained that under the "defraud" clause of § 371, which is at issue here, "the government must prove that the United States was the ultimate target of the conspiracy," whereas under § 371's "any offense" clause, the government is not required to allege that the United States was the intended victim of the conspiracy. *Id.* at 1268. In so holding, we adhered to the Supreme Court's declaration

in *Tanner v. United States,* 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987), that "[t]he conspiracies criminalized by [the defraud clause of] § 371 are defined . . . most importantly . . . by the *target* of the conspiracy." *Id.* at 130, 107 S. Ct. at 2752.

It is clear that under *Tanner,* we must reverse Mendez's § 371 conviction. The *Tanner* defendants conspired to defraud Seminole Electric Cooperative, Inc., a private company. In order to complete a construction project, Seminole obtained a bank loan that was guaranteed by the federal Rural Electrification Administration ("REA"). *Id.* at 110, 107 S. Ct. at 2742. The defendants' § 371 conviction was based on their interference with the REA's operation of its guaranteed loan program. *Id.* at 128-29, 107 S. Ct. at 2752. The defendants argued that a conspiracy to defraud a private corporation that received financial assistance from the federal government does not constitute a conspiracy to defraud the United States. *Id.* at 129, 107 S. Ct. at 2752.

In response, the government argued that a conspiracy to defraud the United States under § 371 may be effected by the use of third parties and that Seminole may itself be treated as "the United States" for purposes of § 371 because it received federal financial assistance and supervision. *Id.* The *Tanner* Court rejected the government's argument, reasoning that a conspiracy to defraud a third party is not itself a conspiracy to defraud the United States simply because the third party receives financial assistance from and is supervised by the United States. *Id.* at

130-32, 107 S. Ct. at 2752-54. The Court then held that the defendants' convictions could only stand if the evidence was sufficient to establish that they conspired to cause Seminole to make misrepresentations to the REA. *Id.* at 132, 107 S. Ct. at 2754.

Here, the district court found that by fraudulently obtaining the CDL, Mendez intended to defraud both the State of Florida, which issued the CDL, and the DOT, which promulgated the minimum rules and regulations for obtaining a CDL. The district court thus concluded that, beyond a reasonable doubt, Mendez had the requisite intent to defraud the United States under § 371.

We disagree. Mendez's § 371 conviction is precisely what the *Tanner* Court meant to prevent. The facts to which the parties stipulated do not show that Mendez even knew the federal government was in involved in the issuance of Florida CDLs, let alone that the United States was the ultimate intended target of Mendez's conduct. Accordingly, under *Tanner,* there was no basis for the district court to find that Mendez was guilty beyond a reasonable doubt of defrauding the United States under 18 U.S.C. § 371.

The government argues that Mendez's payment for and use of the DA-348E form to obtain the CDL was enough to satisfy § 371's intent requirement.[1] In

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[1] The government also asserts that Mendez defrauded the United States Army. Mendez correctly recognizes, however, that this theory was neither in the indictment nor presented at trial.

(Continued on following page)

support of its argument, the government points to the first sentence of the introduction section in the Florida CDL handbook, which describes the "federal requirement that each state have minimum standards for the licensing of commercial drivers." Additionally, the government cites the Florida DMV website, which advises CDL applicants of federal guidelines. Given those facts, the government contends, it is reasonable to infer that Mendez knew of the federal involvement in the issuance of Florida CDLs.

Those facts, however, were not included in the trial stipulation, and therefore are not part of the record. Even if we were to accept such facts as circumstantial evidence, they would not be strong enough to support Mendez's § 371 conviction because the stipulation indicates that Mendez had difficulty reading English. Accordingly, we conclude that it would be mere speculation, rather than a reasonable inference, to conclude that Mendez intended to defraud the DOT based on the references to the federal government in the CDL handbook and Florida DMV website.

The Ninth Circuit faced similar facts and reached a similar conclusion in *United States v. Licciardi,* 30

Accordingly, we may not affirm the conviction on this basis. *See United States v. Elkins,* 885 F.2d 775, 782 (11th Cir. 1989) ("This Court cannot affirm a criminal conviction based on a theory not contained in the indictment, or not presented to the jury.") (citation omitted).

F.3d 1127 (9th Cir. 1994). The defendant in *Licciardi* was a grape broker who defrauded a wine producer and was charged under the defraud clause of § 371 because of the regulatory involvement of a federal agency, the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), in the wine industry. *Id.* at 1128-29. The Court held that the basis suggested in *Tanner* for upholding a defendants' § 371 conviction was lacking because the government failed to show anything beyond the defendants' incidental impairment of ATF functions.[2] *Id.* at 1132. "It might have been easy," the Court explained, "for the government to establish that Licciardi was familiar with the federal regulations on the labelling of wine and that it was a necessary part of his plan of deceit that [the defrauded wine producer] provide information to the government that would frustrate these regulations," but the government did not do so. *Id.*

The government's case is weaker here than it was in *Licciardi.* Given the stipulated facts, it would require much greater speculation for us to infer that Mendez knew of the DOT's involvement in the issuance of Florida CDLs than the speculation that would have been required for the Ninth Circuit to infer that Licciardi, himself a grape broker, did not foresee the effect of his fraudulent activity on the ATF.

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[2] Licciardi's conviction was affirmed on other grounds. *Licciardi,* 30 F.3d at 1134-35.

Finally, the government argues that knowledge that the United States is to be defrauded is not a necessary element of a § 371 offense. In support of its argument, the government cites *United States v. Sorrow,* 732 F.2d 176, 177-79 (11th Cir. 1984), in which we held that the defraud clause of § 371 does not require proof of anti-federal intent. The government also relied on *Sorrow* in *Licciardi,* but the Ninth Circuit commented, "[i]t is doubtful that *Sorrow* survives *Tanner.*" *Licciardi,* 30 F.3d at 1132. We concede that *Sorrow* is superceded by the Supreme Court's holding in *Tanner,* and we hereby expressly overrule *Sorrow.*[3]

B. Interstate Commerce Nexus

Mendez also argues that we must reverse his § 1028(a)(1) conviction because his crime did not sufficiently affect interstate commerce. He contends that if driving on public roads satisfies the minimal interstate nexus requirement, all local crimes would be federalized.

Under 18 U.S.C. § 1028(a)(1) and (c)(3)(A), it is a crime to unlawfully produce an identification document when the production "is in or affects interstate or foreign commerce." To satisfy the interstate commerce

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[3] When a prior panel decision conflicts with a subsequent Supreme Court decision, we must depart from the prior panel precedent and follow the Supreme Court decision. *Cottrell v. Caldwell,* 85 F.3d 1480, 1485 (11th Cir.1996).

requirement, however, the government need only show a minimal nexus. *Klopf,* 423 F.3d at 1239. The government may prove the requisite minimal nexus by showing either that the defendant's actions actually affected interstate commerce, *see* 18 U.S.C. § 1028(c)(3)(A), or by showing that the defendant "had the intent to accomplish acts, which, if successful, would have affected interstate or foreign commerce." *Klopf,* 423 F.3d at 1239.

The district court found Mendez guilty based on the crime's actual affect on interstate commerce. We need not decide that issue, however, because we hold that the district court could have found beyond a reasonable doubt that Mendez intended to accomplish acts that would have affected interstate commerce if they had been successful. Specifically, the stipulated facts show that Mendez paid $1000 to fraudulently obtain the CDL. That alone is sufficient evidence that Mendez intended to use the CDL in a manner that would have affected interstate commerce. Mendez clearly intended to operate a commercial vehicle, and operating a commercial vehicle illegally, even if the vehicle never leaves Florida, sufficiently affects interstate commerce to satisfy the minimal nexus requirement. Accordingly, under *Klopf,* we must affirm Mendez's conviction of Count 2.

CONCLUSION

Because the United States was not the target of Mendez's crime, we reverse Mendez's conviction

under 18 U.S.C. § 371. We affirm Mendez's conviction under 18 U.S.C. § 1028(a)(1), however, because Mendez's intent in fraudulently obtaining the CDL was clearly to illegally operate a commercial vehicle, which would sufficiently affect interstate commerce.

AFFIRMED IN PART, REVERSED IN PART.

United States District Court
Southern District of Florida
FT. LAUDERDALE DIVISION

UNITED STATES OF AMERICA

v.

JILDARDO MENDEZ

JUDGMENT IN A CRIMINAL CASE

Case Number: 0:07CR20331-Dimitrouleas

USM Number: 78587-004

Counsel for Defendant: DAVID MARCUS

Counsel for the United States: LAURIE RUCOBA

Court Reporter: Robert Ryckoff

(Entered Jul. 11, 2007)

The defendant was found guilty on Count I and II of the Second Superseding Indictment. The defendant is adjudicated guilty of the following offense(s):

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 371	Conspiracy to defraud the United States	9/14/2006	I
18 U.S.C. § 1028(a)(1), (c)(3)(A), and (f)	Unlawful production of identification documents	9/14/2006	II

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
7/10/2007

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

July 10, 2007

PROBATION

The defendant is hereby sentenced to probation for a term of **ONE YEAR** AS TO COUNTS I and II TO RUN CONCURRENTLY WITH EACH OTHER.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11. the defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer.

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional condition(s) of probation:

The defendant shall perform **50 hours** of community service over the period of supervision, as directed by the United States Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$200.00	**$**	**$**

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$200.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of

criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately, the U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JILDARDO MENDEZ,

Defendant. /

CASE NO. 07-20331-CR-DIMITROULEAS

ORDER

THIS CAUSE came before the Court pursuant to a waiver of jury trial consistent with Rule 23(a), Fed. R. Cr. Proc. Although not requested pursuant to Rule 23(c), Fed. R. Crim. Proc., the Court states specific findings of fact and conclusions of law.

1. On June 28, 2007, a second Superceding Indictment was returned charging Mendez with Count I, Conspiracy to Defraud the United States (U.S. Dept. of Transportation) by fraudulently obtaining a commercial driver's license and Count II, Attempting, without lawful authority, to cause to be produced an identification document, affecting interstate commerce. [DE-37].

2. On July 5, 2007, the Court considered the stipulated facts [DE-42] and heard arguments of counsel. Since the court did not hear any testimony, the stipulated facts are adopted as true, there being no issues of credibility for the Court to decide.

3. Through Chapter 313, Congress has heavily regulated Commercial Motor Vehicle Operators. It has defined commerce, 49 U.S.C. § 31301(2), as affecting trade, traffic and transportation between states. Congress has defined a commercial drivers license, 49 U.S.C. § 31301(3), and commercial motor vehicle, 49 U.S.C. § 31301(4). Congress has mandated notification requirements for an operator to notify his employer of traffic violations or license revocations within 30 days. 49 U.S.C. § 31303(a) and (b). Operators must also notify prospective employers of previous employment as an operator of a commercial motor vehicle. 49 U.S.C. § 31303(c). Congress has prohibited employers from allowing an operator to drive while his license is suspended or revoked or when the operator possesses more than one driver's license. 49 U.S.C. § 31304. Congress has established minimum standards for testing and fitness. 49 U.S.C. § 31305. Congress has established procedures for random alcohol and drug testing. 49 U.S.C. § 31306. Congress has allowed the Secretary of Transportation to establish uniform minimum standards for the issuance of commercial drivers' licenses. 49 U.S.C. § 31308. Congress authorized the Secretary of Transportation to establish an information system about the driving status of commercial motor vehicle operators. 49 U.S.C. § 31309. Congress has regulated procedures for disqualifying commercial motor vehicle operators from driving for at least one year for violations of crimes (including D.U.I. with a blood alcohol level of as law as .04 percent, which is lower than the

blood level for D.U.I. in almost all states). 49 U.S.C. § 31310.

4. On September 14, 2006, Mendez obtained a commercial drivers license by using a fraudulent DA-348E form that he had purchased for $1,000. He would have had to surrender any drivers license that he possessed at that time. F.S. § 322.03. He then drove home from the Homestead, Florida Dep't of Motor Vehicles Office to his residence in a regular passenger vehicle. On April 9, 2007, Mendez drove to the Coral Reef Dep't of Motor Vehicle Office and was arrested.

5. Mendez intended to use a fraudulent document to obtain a commercial drivers' license that he felt he would not otherwise be able to obtain. He was willing to pay $1,000 to accomplish this goal. Congress has heavily regulated the method of obtaining commercial drivers' licenses. By fraudulently obtaining the license, Mendez was intending to defraud the issuing agencies, in this case both the State of Florida, who issued the license, and the U.S. Dept. of Transportation, who promulgated the minimum rules and regulations for obtaining such a license. Consequently, the Court finds, beyond a reasonable doubt, that Mendez intended to defraud both the State of Florida and the federal government (and any one else who might have a say in his obtaining the license).

6. The Government need only prove a minimal nexus with interstate commerce in a § 1028(a) prosecution. *U.S. v. Klopf,* 423 F. 3d 1228, 1239 (11th Cir.

2005), Mendez drove home from Homestead with the commercial drivers license on September 14, 2006. He drove to Coral Reef on April 9, 2007 with that license. He lives at 36609 S.W. 217 Avenue in Florida City and owns Gilbert's nursery. The Court concludes that he drove vehicles for both business and pleasure during the six months that he possessed the fraudulently obtained commercial drivers license. The car that he drove would have been manufactured outside the state of Florida. The gasoline that he put in the car was refined outside the State of Florida. He drove on roads that were partially supported by federal funds. The court finds, beyond a reasonable doubt, that Mendez's crime had an effect on interstate commerce.

Wherefore, the Court finds Mendez guilty on both counts.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 10th day of July, 2007.

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

David O. Markus, Esquire

Laurie E. Rucoba, AUSA